Office-Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS,
CLERK

82-1042
No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STEPHEN M. SUNDHEIMER,

Petitioner,

—against—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. May a federal agency expand its statutory authority by prosecuting acts which are merely "tantamount to" violations proscribed by statute?

II. Does the term "accommodation trade", as prohibited by §4C(a) of the Commodity Exchange Act, include non-fictitious transactions?

III. Is the term "accommodation trade", as prohibited by section 4C(a) of the Commodity Exchange Act, and as applied by the Commodity Futures Trading Commission, void for vagueness?

IV. May a federal agency, without notice, change the theory of its case and summarily impose harsh sanctions?

V. Does a general plea of guilty, and pleading allocution, to a single-count criminal information

containing many elements, any one of which would be sufficient to convict, establish all elements charged in the information sufficient to support summary disposition by a federal agency required by statute to hold an adjudicatory hearing?

VI. Does a federal agency which is required to consider evidence of rehabilitation behave arbitrarily and capriciously in rejecting uncontested evidence of rehabilitation (and imposing sanctions) under an unannounced rule that rehabilitation cannot occur before a minimum passage of time (more than seven years) has elapsed?

PARTIES

Petitioner is Stephen M. Sundheimer.

Respondent is the Commodity Futures Trading Commission.

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IN THE

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OCTOBER TERM 1982

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STEPHEN S. SUNDHEIMER,

Petitioner,

-against-

COMMODITY FURURES TRADING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Stephen M. Sundheimer respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit issued in this action on September 3, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 688 F.2d 150. The decision and order of the full Commodity Futures Trading Commission issued on September 16, 1981, and amplified by a further order is reported at 2 Comm. Fut. L. Rep. (CCH) ¶21,245 (1981). The opinion of the administrative law judge is not reported.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was filed on September 3, 1982. The Court of Appeals denied a petition for a rehearing (with a suggestion that it be heard En Banc) on October 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

RELEVANT STATUTES AND RULES

COMMODITY EXCHANGE ACT OF 1974

Sec. 4c. (a) It shall be unlawful for any person to offer to enter into, enter into or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transactiuon in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof--

(A) if such transaction is, is of the character of, or is commonly known to the trade as, a "wash sale", "cross-trade", or "accomodation trade", or is a

fictitious sale;

* * *

(C) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

* * *

Sec. 6(b) If the Commission has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, * * * or otherwise is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission thereunder, it may serve upon such

person a complaint stating its charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice of the Commission, and to show cause why the registration of uch person, if registered as futures commission merchant or any person associated therewith as described in section 4k of this Act, commodity trading advisor, commodity pool operator, or as floor broker

hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Commission or before an Administrative Law Judge designated by the Commission * * *. Upon evidence received, the Commission may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or any person associated therewith as described in section 4k of this Act, commodity trading advisor, commodity pool operator, or as floor broker hereunder, may suspend, for a period not to exceed

six months, or revoke, the registration of such person, and may assess such person a civil penalty of not more than $100,000 for each such violation. * * * After the issuance of the order by the Commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition, within fifteen days after the notice of such order is given to the offending person, praying that the order of the Commission be set aside. * * * Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the

findings of the Commission, as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

Sec. 6(d) In determining the amount of the money penalty assessed under paragraph (b) of this section, the Commission shall consider, in the case of a person whose primary business involves the use of the commodity futures market--the appropriateness of such penalty to the size of the business of the person charged, the extent of such person's ability to continue in business, and the gravity of the violation; and in the case of a person whose primary business does not involve the use of the commodity futures market--the appropriateness of such penalty to the net worth of the person

charged, and the gravity of the violation.

* * *

Sec. 8a. The Commission is authorized--

(2) to refuse to register any person--

* * *

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, * * * was convicted of a felony in any State or Federal court, * * *

* * *

(3) in accordance with the procedure provided for in paragraph (b) of section 6 of this Act, to suspend or revoke the registration of any person registered

under this Act if cause exists under subparagraph (2)(B) or (C) which would warrant a refusal of registration of such person,

* * *

Sec. 13. (a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations or orders issued pursuant to this Act, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this Act or any of such rules, regulations, or orders may be held responsible in

administrative proceedings under this Act for such violation as a principal.

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C.A. §704. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A prelimimary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides

that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C.A. §706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional

right, power privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party,

and due account shall be taken of the rule of prejudicial error.

CFTC RULES OF PRACTICE

§10.91 Summary Dispositions

(a) Filing of motions, answers. Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law may move for a summary disposition in his favor of all or any part of the proceeding.

* * *

(b) Supporting papers. A motion for summary judgment shall include a statement of material facts as to which the moving party contends there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, including investigative transcripts, admission, stipulations,

and depositions. The motion may also be supported by briefs containing points and authorities in support of the contention of the party making the motion. When a motion is made and supported as provided in this section, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits or otherwise. He may also submit a brief of points and authorities.

* * *

(e) Ruling on motion. The Administratove Law Judge shall grant a motion for summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions,

stipulations, and depositions, and matters of official notice show that (1) there is no genuine issue as to any material fact, (2) there is no necessity that further facts be developed in the record, and (3) such party is entitled to a decision as a matter of law.

STATEMENT OF THE CASE

The petitioner ("Mr. Sundheimer") has been a commodities trader and floor broker for 20 years.

In the fall of 1974 Mr. Sundheimer passively acquiesced in his business associate's participation in certain prearranged crude oil futures trades at a time when crude oil futures were not regulated by the Commodities Exchange Act (the "Act"). After the transactions, the Act was amended (the "Amendment") to make it applicable to

crude oil futures effective April 21, 1975.

Income tax filings by others in respect of these transactions did constitute tax fraud, a subject over which the Commodity Futures Trading Commission (the "CFTC") obviously had no jurisdiction. Mr. Sundheimer cooperated with a criminal investigation of the transactions, testified against the principals and pleaded guilty to an information charging him generally with aiding and abetting false tax filings at various pleaded times, including times before and after the effective date of the Amendment. Mr. Sundheimer served the sentence imposed by United States District Judge Broderick.

Five years later the CFTC charged Mr. Sundheimer with an undifferentiated

panaoply of violations of the Act arising out of these transactions and obtained partial summary disposition on the grounds that Mr. Sundheimer's plea of guilty and plea allocution established that he had entered into prearranged trades in crude oil futures after the effective date of the Amendment. On appeal within the CFTC, the CFTC observed that a "prearranged trade" was not a per se violation of the Act, held that the proof did not establish market manipulation or fictitious sales but concluded that Mr. Sundheimer's acts were "tantamount to" accommodation trades, long prohibited by commodities regulatory acts but first applied to crude oil futures by the Amendment.

The plea allocution was ambiguous in establishing whether or not the

prearranged transactions occurred after the April 21, 1975 effective date of the Amendment. The initial transactions occurred in 1974. Mr. Sundheimer forthrightly acknowledged in his plea allocution that "implicit in the initial understanding" was a liquidating transaction. This acknowledgement was in response to Judge Broderick's inquiry about "consent to a similar arrangement for the following year." Mr. Sundheimer's acknowledgement does not acknowledge any transaction as late as April 21, 1975. This plea allocution was the sole evidence on which the CFTC granted summary disposition

The CFTC is required in cases where sanctions are imposed for criminal convictions to hold a hearing on the issues of mitigation and possible

rehabilitation. Mr. Sundheimer produced sixteen prominent witnesses who testified as to his good character and rehabilitation. Nevertheless, the CFTC rejected the uncontraverted evidence of his present good character and reliability and held that an insufficient passage of time for seven years precluded his establishing that he had been rehabilitated.

The CFTC permanently revoked Mr. Sundheimer's broker registration, imposed its maximum authorized penalty of $100,000 and prohibited Mr. Sundheimer for two years from trading in commodities futures contracts.

REASONS FOR GRANTING THE WRIT

I. THE DECISION ERRONEOUSLY EXPANDS THE STATUTORY TERM "ACCOMMODATION TRADES" TO ENCOMPASS NON-FICTITIOUS TRANSACTIONS.

Section 4C(a) of the Act, made applicable to crude oil futures only after April 21, 1975, prohibits any transaction which "is, is of the character of, or is commonly known to the trade as a[n] * * * 'accommodation trade'." The Act contains no definition of "accommodation trade".

All interpretive case law and CFTC definitions require that an "accommodation trade" be a fictitious transaction.* The CFTC properly held that

*In two isolated decisions, the Department of Agriculture [the CFTC's predecessor] used the term "accommodation trade" to mean a "wash" (meaning fictitious, in that there is no "actual change of ownership") trade to enable the opposite broker to offset his [footnote con't on next page]

the present transactions were not fictitious, because positions were actually taken in the market in

(footnote con't)

own customer's sales and purchases without detection. Irwin M. Eisen, 22 Agric. Dec. 758, 760 (1963); Julian M. Marks, 22 Agric. Dec. 761, 772 (1963).

In 1966, the CFTC's predecessor, the Commodity Exchange Authority, adhered to the requirement that the transaction be fictitious. Under this definition, "accommodation trading" meant:

"'wash trading entered into by one broker to assist another broker to make cross trades, wash trades***.'" CFTC v. Savage, 611 F.2d 270, 284 n.13 (9th Cir. 1979).

In 1979, the CFTC submitted a glossary to the Senate Committee on Agriculture, Nutrition and Forestry, and there again defined "accommodation trade", as

> "[w]ash trading entered into by a trader usually to assist another with illegal trades," 95th Cong. 2d Sess., Committee Print, Futures Trading Act of 1978, January 1979, p. 141, et seq.,

and "wash trading" as

> "[e]ntering into, or purporting to enter into transactions to give the appearance that purchases and sales

[footnote con't on next page]

connection with these transactions. The CFTC, acknowledging that these transactions were not "accommodation trades", held that they were "tantamount" to "accommodation trades".

The Second Circuit Court of Appeals, however, erroneously held that the subject transactions met the definition of "accommodation trade" and thereby expanded the jurisdiction of the CFTC.

II. THE DECISION PURPORTS TO PERMIT THE CFTC (AND OTHER FEDERAL AGENCIES) TO IMPOSE SANCTIONS FOR ACTS MERELY "TANTAMOUNT TO", BUT NOT ACTUALLY CONSTITUTING, A STATUTORY VIOLATION.

Acknowledging that the prohibited

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are being or have been made, usually not resulting in a change in the trader's market position." Id. at 164. Hence, under both the 1966 and 1979 definitions, an "accommodation trade" must be a fictitious trade.

practice ("accommodation trading" which must be fictitious trading) was not involved in the instant case, the CFTC nevertheless held Mr. Sundheimer's acts violative of §4C(a) because they were "tantamount to" such a violation. The Court of Appeals determined that this holding merely "involved an imprecise, and therefore objectionable, choice of language," but sustained the CFTC, because "it is apparent that the Commission equated the terms 'tantamount to' and 'of the character of." If this be the case, the CFTC was not entitled to do so, because the language "of the character of" is intended not to broaden the category of statutory violations, but rather to proscribe the specified act, whether or not the term used to describe it subsequently changes. See

CFTC v. Morgan, Harris & Scott, Ltd., 484 F.Supp. 669, 676 (S.D.N.Y. 1979). Cf. Precious Metals Assoc., Inc. v. CFTC, 620 F.2d 900, 906-908 (1st Cir. 1980).

1. Important Issue of Federal Law

The CFTC "may not bootstrap itself into an area in which it has no jurisdiction by *** violating its statutory mandate." Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973). See also, SEC v. Sloan, 436 U.S. 103 (1978). The "tantamount" holding, if sustained, would make 4C(a) "a solution to virtually any other problem which might occur in the market place." Sloan, supra, 436 U.S. at 117.

In Sloan, this Court rejected a similar attempt to broaden an agency's

remedial powers beyond that "clearly contemplated by" its enabling statute, stating "[w]e do not think [the section] * * * was meant to be such a cure-all." Id. Moreover, "had Congress intended the Commission to have the power * * * we expect that it could and would have authorized it more clearly." 436 U.S. at 122.

2. Conflict Among the Circuits

The Second Circuit's acquiescence to the CFTC's expansive interpretation of its enabling statute conflicts with the holdings of other Circuit Courts of Appeal.* Here, the Second Circuit

*An Agency's effort "to enlarge * * * the application of a statute should be subjected to close scrutiny," Celebrezze v. Kilborn, 322 F.2d 166, 168 (5th Cir. 1963), and the agency's order must be set aside "if the agency's underlying standards are not in accord with law," [footnote con't on next page]

stated that the CFTC did not "adhere to the language of the statutes they are enforcing" (5a), and yet inexplicably upheld the CFTC's order. In doing so, the Second Circuit adopted a far more

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Wheatley v. Adler, 407 F.2d 307, 310 (D.C. Cir. 1968), because "[a]n administrative decision based upon erroneous standards cannot stand," Kovac v. Immigration and Naturalization Serv., 407 F.2d 102, 104 (9th Cir. 1969). An agency whose holding "cannot be derived from the statutory language or from prior [agency] *** precedent" has acted "outside the law," IBEW v. NLRB, 487 F.2d 1143, 1171 (D.C. Cir, en blanc, 1973), cert. denied, 418 U.S. 902 (1974), and a court's obligation to defer to an agency's interpretation of its enabling statute "is limited by this court's obligation 'to honor the clear meaning of the statute, as revealed by its language, purpose, and history', [citing Daniel, supra, 439 U.S. at 566, n.20], and by the requirement that the agency interpretation not be clearly wrong or unreasonable." Coca-Cola Co. v. Atchison, T. & S.F. Ry. Co., 608 F.2d 213, 222 (5th Cir. 1979).

lenient standard of review of a Federal Agency's independent expansion of its statutory authority than that employed by other circuits.

III. THE STATUTORY PROHIBITION OF "ACCOMMODATION TRADES" IS VOID FOR VAGUENESS UNDER THE UNITED STATES CONSTITUTION

In the instant case The CFTC has ascribed a meaning to the term "accommodation trade" different from that ascribed to it at any prior time: a trade in which actual positions were taken by both sides to the transaction. The term has had a fluid and expanding meaning over the years (see Point I, supra), which patently suggests that the term is unduly vague.* Indeed, the

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*Under the void-for-vagueness rule, vague or fluid terms, such as
[footnote con't on next page]

Senate Committee considering the 1974 enactment of the Act tacitly acknowledged that "accommodation trade" is a meaningless term, by declining to define it. The term is not defined in the Act, and only vaguely defined by CFTC case law and definitions. Where so defined, the term has been construed to require fictitious trading (see Point I, supra).

The Second Circuit nevertheless held that "there is no constitutional ambiguity in identifying an accommodation trade in these terms" a holding which conflicts with that of United States District Court for the Northern

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"accommodation trade" may not be used to identify the act which is prohibited. Grayned v. City of Rockford, 408 U.S. 104 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

District of Illinois in United States v. LaMantia, [1977-80 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶20,667 (N.D. Ill. 1978), which held the term "fictitious sale", a companion in §4C(a) to "accommodation trade", unconstitutionally vague, because, like the term "accommodation trade" as applied by the CFTC in the present case, it was not defined in the Act, there was no judicial construction of the term, the term did not appear in treatises on commodities and the definition sought by the government was not supported by the legislative history of the Act.

IV. THE DECISION PERMITS A FEDERAL AGENCY REVIEWING AN ADMINISTRATIVE LAW JUDGE DECISION TO CHANGE THE THEORY ON WHICH THE DEFENDANT IS CHARGED AND TO SUMMARILY IMPOSE HARSH SANCTIONS WITHOUT ANY PRIOR NOTICE.

Notice of charges is an essential

element of due process.* An agency may not impose sanctions without first giving the party to be sanctioned notice affording him the opportunity to oppose.**

*Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

**Hess & Clark, Div. of Rhodia, Inc. v. FDA, 495 F.2d 975 (D.C. Cir. 1974); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968); NLRB v. Tennsco, 339 F.2d 396 (6th Cir. 1964); NLRB v. Johnson, 322 F.2d 216 (6th Cir. 1963), cert. denied, 376 U.S. 951 (1964). In Rodale Press, supra, the D.C. Circuit stated the rule which governs the present case as follows:

> "By substituting an issue *** for the one framed by the pleadings ***, the Commission has deprived petitioners of both notice and hearing on the substituted issue. The evil at which the statute [the Administrative Procedure Act] strikes is not remedied by observing that the outcome would perhaps or even likely be the same. It is the opportunity to present argument

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In the instant case, however, the CFTC complaint charged Mr. Sundheimer with market manipulation and, in the disjunctive and merely in the words of the statute, with possibly aiding and abetting one or another of seven additional separate acts prohibited by the Act. On motion for summary disposition, the Division of Enforcement claimed only that Petitioner had prearranged trades and manipulated ,

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> under the new theory of violation, which must be supplied." 407 F.2d at 1257.

Accord, National Realty & Constr. Co. Inc. v. OSHRC, 489 F. 2d 1257 (D.C. Cir. 1973); Bendix Corp. v. FTC, 450 F.2d 534 (6th Cir. 1971); C&C Market, Inc. v. United States, 473 F.Supp. 519 (E.D. Mo. 1979). Thus, "one cannot be found guilty [by an Agency] of an offense not encompassed by the complaint or of which he had no fair notice." NLRB v. Tennsco, 339 F.2d 396, 399 (6th Cir. 1964).

markets. The ALJ held that petitioner had engaged in manipulation and fictitious sales.

On appeal, the CFTC rejected these holdings and conclusions, but nevertheless, without giving petitioner any notice that a new question was at issue, affirmed the ALJ decision because petitioner's acts were "tantamount to 'accommodation trades'". Mr. Sundheimer was first notified that he would be sanctioned summarily for engaging in activities "tantamount to accommodation trading" or for accommodation trading in the Order which imposed the sanctions. Mr. Sundheimer did not litigate the issue relating to acts "tantamount to accommodation trading" because he received no advance notice whatever that he was being charged with committing an

act "tantamount to" a violation of the Act.

Despite the foregoing, and despite the requisites of due process as established in other circuits, the Second Circuit held that the CFTC's actions comported with the Constitution.

V. THE DECISION SUSTAINS THE CFTC IN GRANTING SUMMARY DISPOSITION BASED UPON AMBIGUOUS EVIDENCE WHERE AN EVIDENTIARY HEARING SHOULD HAVE BEEN GRANTED.

The criminal information to which Mr. Sundheimer pled charged many overt acts and many possible times for the commission of the acts, some prior to the effective date of the Act and some subsequent to this date. The CFTC, of course, lacks authority to impose sanctions for acts which occurred prior to the effective date of the Act.

Where, as here, the commission of any of several acts referred to in the accusatory instrument would sustain the conviction, a general plea of guilty or conviction, without more, may not be used in another proceeding to establish under theories of collateral estoppel that any particular one of the acts charged actually occurred.* Here, a number of possible acts were charged as occuring either before or after the effective date of the Act purporting to

*Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951); Piper v. United States, 392 F.2d 462 (5th Cir. 1968); United States v. Fabric Garment Co., 366 F.2d 530 (2d Cir. 1966); United States v. Guzzone, 273 F.2d 121 (2d Cir. 1959); United States v. Levinson, 369 F.Supp. 575 (E.D. Mich. 1973); United States v. American Packing Corp., 113 F.Sup. 223 (D. N.J. 1953). In Emich, supra, this Court stated the rule which governs the present as follows:

"***A general verdict *** does not

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prohibit only some of them, but all acts and dates need not have been proved for conviction. Accordingly, the guilty plea did not establish that any particular act was committed or that it was committed after April 21, 1975, the effective date of the Act.

Petitioner's plea allocution was equally ambiguous. While admitting that the transaction in which he acquiesced possibly entailed a subsequent correcting transaction in the year 1975,he did not in his plea statement

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> indicate which of the means charged in the indictment were found to have been used in effecutating the conspiracy. And since all of the acts charged need not be proved for conviction [citation omitted], such a verdit does not establish that defendants used all of the means or any particular one." 340 U.S. at 568-569.

indicate whether such a correcting transaction would have occurred after April 21, 1975, the effective date of the Act. Assuming arguendo that petitioner's plea statement was susceptible of interpretation as referring to a post-April 21, 1975 transaction, that is only one possible interpretation and establishes only that the statement is ambiguous. An ambiguous statement may not be used to create an estoppel.* Accordingly, petitioner's plea statement was insufficient as evidence for collateral

*Kauffman v. Moss, 420 F.2d 1270 (3rd Cir. 1970), cert. denied, 400 U.S. 846 (1970), Kelly v. Illinois Bell Tel. Co., 325 F.2d 148 (7th Cir. 1963). Cf. Northern Oil Co. Inc. v. Socony Mobil Oil Co., Inc., 368 F.2d 384 (2d Cir. 1966); McNellis v. First Fed. Sav. & Loan Ass'n, 364 F.2d 251 (2d Cir. 1966), cert. denied, 385 U.S. 970 (1966)

estoppel purposes to support summary judgment. Moreover, where there are substantial disputed facts as to the meaning of the plea and plea statement and the inferences to be drawn therefrom, summary judgment is improper.*

Despite the foregoing, and contrary to existing case law, the Court of Appeals held that summary judgment on the issue of petitioner's liability was proper and that the guilty plea to the multi-element information together with

*See, Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962); Robertson v. Siedman & Siedman, 609 F.2d 583 (2d Cir. 1979); National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023 (D.C. Cir. 1978); Patagonia Corp. v. Board of Governors of the Fed. Reserve Sys., 517 F.2d 803 (9th Cir. 1975); Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974).

ambiguous plea statement were sufficient to conclusively establish a post-April 21, 1975 violation.

VI. THE DECISION UPHOLDS THE CFTC'S NEW RULE THAT REHABILITATION CANNOT BE DEEMED TO HAVE OCCURRED UNLESS MORE THAN AT LEAST SEVEN YEARS HAVE ELAPSED.

The CFTC customarily receives evidence of mitigating circumstances and rehabilitation at a hearing prior to revoking the registration of a floor broker. During a three-day hearing, sixteen witnesses, including one of the prosecutors of the tax fraud case, gave substantial evidence on Mr. Sundheimer's behalf in support of his rehabilitation. The CFTC then rejected Mr. Sundheimer's claim of rehabilitation, because "rehabilitation in a case like this requires a much greater passage of

time before any such evidence can persuade us that rehabilitation has in fact occurred".

The rule requiring a minimum passage of time before rehabilitation may be found to have occurred was neither openly promulgated nor previously announced. By imposing the rule on petitioner seven years after the events complained of, the CFTC deprived the hearing on rehabilitation and mitigation of any meaning, and thus realistically denied him his right to a hearing.

CONCLUSION

The issues raised by the proceedings below are substantial. Federal agencies should be restrained from expanding their jurisdiction by reinterpreting statutory prohibitions or by prosecuting acts which are merely "tantamount to"

specified offenses. Ambiguous statutory provisions should not support substantial sanctions and forfeitures. Federal agencies should not deprive a person of his right to an evidentiary hearing on the basis of ambiguous evidence. Federal agencies should not dispense with vested rights to establish rehabilitation by resorting to an unpromulgated rule requiring passage of more than seven years for rehabilitation to occur.

The decision of the Second Circuit conflicts with the positions on these issues adopted by other Circuit Courts of Appeal and by this Court. The decision impacts broadly on the evolving regulatory scheme of an increasingly important nationwide industry. Moreover, the decision is a signal to other

federal agencies that conduct similar to that of the CFTC in the present proceeding will be condoned.

Accordingly, it is highly desirable that review be granted.

Respectfully submitted,

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